

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 K.M. et al.,

11 Plaintiffs,

12 v.

13 REGENCE BLUESHIELD, et al.,

14 Defendants.

CASE NO. C13-1214 RAJ
15 ORDER

16 **I. INTRODUCTION**

17 This matter comes before the court on plaintiffs' motion for preliminary injunction
18 and motion for class certification.¹ Dkt. ## 17, 20. Defendants Regence BlueShield and
19 Cambria Health Solutions, Inc., f/k/a The Regence Group oppose the motions. Dkt. ##
20 23, 26.

21 As a preliminary matter, defendants move to strike new evidence and argument
22 submitted for the first time with plaintiffs' reply. Dkt. # 32. With respect to argument,
23 plaintiffs' arguments in reply respond directly to defendants' arguments in opposition,
24 and are therefore appropriate. With respect to evidence, plaintiffs argue that the evidence

25
26 ¹ Although the motion for preliminary injunction is styled as "plaintiffs' motion," it
27 appears that only B.S. and Disability Rights Washington ("DRW") seek class-wide preliminary
injunctive relief (and not K.M.). See Dkt. # 17 at 11-15.

1 is consistent with plaintiffs' arguments in their opening brief and responsive to
2 defendants' brief. Dkt. # 46 at 2 (citing *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032,
3 1040 (9th Cir. 2003)). Courts in this District have denied motions to strike evidence
4 submitted with a parties' reply when it is evidence submitted in response to arguments
5 raised in a party's opposition. *See e.g., Reming v. Holland Am. Line Inc.*, Case No. C11-
6 1609RSL, 2013 WL 5963119, *3 (W.D. Wash. Nov. 7, 2013); *Lexington Ins. Co. v.*
7 *Swanson*, Case No. C05-1614MJP, 2007 WL 1585099, *5 (W.D. Wash. May 23, 2007).
8 The evidence submitted in reply responds to defendants' arguments and evidence in
9 opposition. Accordingly, it is properly before the court. Nevertheless, plaintiffs indicate
10 that since the motions before the court are preliminary and non-dispositive, plaintiffs do
11 not object to a decision by the court to not rely upon the additional evidence submitted to
12 ensure an expedited decision. Dkt. # 46 at 1. Because the evidence submitted by
13 plaintiffs in reply is superfluous and plaintiffs do not object to a decision by the court to
14 not rely upon the evidence, the court has not considered the evidence submitted in reply.²

15 Having considered the memoranda, evidence, oral argument, and the record
16 herein, the court GRANTS plaintiffs' motions.

17 II. BACKGROUND

18 Plaintiffs B.S. and K.M. filed suit on July 11, 2013,³ alleging that Defendants have
19 failed to comply with Washington's Mental Health Parity Act ("Parity Act") and the Paul
20 Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008
21 ("Federal Parity Act").⁴ Dkt. # 1 at ¶¶ 10-14.⁵ B.S., K.M., and DRW contend that the

22 ² Accordingly, the court has not considered the September 20, 2013, declarations of
23 Eleanor Hamburger and Mark Stroh. Dkt. ## 30-31.

24 ³ In related case *J.T. v. Regence BlueShield*, Case No. C12-90 RAJ, this court denied
25 plaintiffs' request to substitute B.S. as a named plaintiff in that case. Case No. C12-90RAJ Dkt.
85 at 2. The court recognized that the practical implication may result in B.S. filing a separate
complaint. Id. at 2-3. B.S. has now done so here.

26 ⁴ Plaintiffs' motions do not seek relief based on the Federal Parity Act.

27 ⁵ DRW was not named as a plaintiff in the original complaint, but was added to the
amended complaint ("FAC") filed July 18, 2013. *See* Dkt. ## 1, 13. DRW is the state-

1 health care plans underwritten by Defendants do not provide coverage for K.M and B.S.’s
2 medically necessary neurodevelopmental therapy, thus violating the mandates of the
3 Parity Act and the Federal Parity Act. Dkt. # 13 (FAC) ¶¶ 11–18.

4 The Employee Retirement Income Security Act (“ERISA”) governs the health
5 care plans at issue, and thus plaintiffs bring their claims under its provisions. *See* 29
6 U.S.C. § 1002(1). Plaintiffs’ amended complaint sets forth three claims for relief: (1)
7 breach of fiduciary duties pursuant to ERISA § 404(A)(1), 29 U.S.C. § 1104(A); (2)
8 recovery of benefits, clarification of rights under terms of the plan, and clarification of
9 rights to future benefits under the plan pursuant to ERISA § 502(a)(1)(B), 29 U.S.C.
10 § 1132(a)(1)(B); and (3) to enjoin acts and practices in violation of the terms of the plans,
11 to obtain other equitable relief, and to enforce the terms of the plans pursuant to ERISA
12 § 502(a)(3), 29 U.S.C. § 1132(a)(3). Dkt. # 13 (FAC) ¶¶ 36–49.

13 B.S. is a nine year-old⁶ who is enrolled in a Regence-insured health plan through
14 his father’s employment. Dkt. # 6 (E.S. Decl.) ¶ 2, Ex. A. Several medical professionals
15 confirmed B.S.’s diagnosis of autism, a condition listed in the Diagnostic and Statistical
16 Manual (“DSM”) published by the American Psychiatric Association that qualifies as a
17 “mental health condition,” and recommended speech and language therapy for treatment.
18 Dkt. # 6-2 at 5-7 (Ex. B to E.S. Decl., April 17, 2012, Araujo Eval.); # 6-4 at 2-4 (Ex. D
19 to E.S. Decl., July 25, 2012, Long Eval.); # 6-5 at 2 (Ex. E to E.S. Decl., Aug. 7, 2012,
20 Wagner Letter); *see also* Dkt. # 6-3 at 2-3 (Ex. C to E.S. Decl., Oct. 22, 2012, Gray
21 Eval.). B.S.’s parents submitted claims to Regence for coverage of his speech and
22 occupational therapies, but Regence denied coverage because B.S. was “over the age of
23

24 designated protection and advocacy organization pursuant to the Federal Developmental
25 Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15041, *et seq.*, the Protection and
Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, *et seq.*, and RCW
71A.10.080. Dkt. # 19 (Stroh Decl.) ¶ 3.

26 ⁶ B.S. was born in 2004, and as of July 11, 2013, was eight years old. Dkt. # 6 (E.S.
27 Decl.) ¶ 2; # 6-2 at 2 (Ex. B to E.S. Decl.). During oral argument, the parties confirmed that B.S.
is currently nine years old.

1 six and did not meet the age limit set by [his] contract for this benefit.” Dkt. # 6-6 at 3
2 (Ex. F to E.S. Decl.).

3 B.S.’s plan contains the following relevant provisions:

4 We cover Mental Health Services for treatment of Mental Health
5 Conditions.

6 * * *

7 Mental Health Conditions means Mental Disorders in the most recent
8 edition of the Diagnostic and Statistical Manual of Mental Disorders
9 published by the American Psychiatric Association except as otherwise
10 excluded under this Contract. Mental Disorders that accompany an
11 excluded diagnosis are covered.

12 Mental Health Services means Medically Necessary outpatient services,
13 Residential Care, partial hospital program or inpatient services provided by
14 a licensed facility or licensed individuals with the exception of Skilled
15 Nursing Facility services (unless the services are provided by a licensed
16 behavioral health provider for a covered diagnosis), home health services
17 and court ordered treatment (unless the treatment is determined by Us to be
18 Medically Necessary).

19 * * *

20 We cover inpatient and outpatient neurodevelopmental therapy services.
21 To be covered, such services must be to restore and improve function for a
22 Member age six and under with a neurodevelopmental delay. For the
23 purposes of this provision, neurodevelopmental delay means a delay in
24 normal developmental that is not related to any documented Illness or
25 Injury. Covered Services include only physical therapy, occupational
26 therapy and speech therapy and maintenance services, if significant
27 deterioration of the Member’s condition would result without the service.

28 * * *

29 Medically Necessary or Medical Necessity means health care services or
30 supplies that a Physician or other health care Provider, exercising prudent
31 clinical judgment, would provide to a patient for the purpose of preventing,
32 evaluating, diagnosing or treating an Illness, Injury, disease or its
33 symptoms, and that are:

34 • in accordance with generally accepted standards of medical practice;
35 • clinically appropriate, in terms of type, frequency, extent, site and duration,
36 and considered effective for the patient’s Illness, Injury or disease; and
37 • not primarily for the convenience of the patient, Physician or other health care
Provider, and not more costly than an alternative service or sequence of

1 services or supply at least as likely to produce equivalent therapeutic or
2 diagnostic results as to the diagnosis or treatment of that patient's Illness,
3 Injury or disease.

4 Dkt. # 6-1 at 18-19, 67 (Ex. A to E.S. Decl., Policy at 11-12, 60).

5 B.S. and DRW seek a preliminary injunction prohibiting defendants from denying
6 coverage for neurodevelopmental therapy to treat mental health conditions based on the
7 age exclusion in defendants' plans. B.S. and DRW also seek class certification for a
8 prospective neurodevelopmental subclass related to Regence's age exclusion for
9 neurodevelopmental therapy to treat mental health conditions.

10 III. ANALYSIS

11 A. Parity Act

12 "Prior to 2005, no Washington state law mandated that insurance providers
13 include coverage for mental health services in their health benefit plans." *J.T. v. Regence*
14 *BlueShield*, 291 F.R.D. 601, 606 (W.D. Wash. 2013) (citing S.B. Rep., S.H.B. 1154
15 (Wash. 2005)). "The legislature addressed this lack of coverage in the Parity Act, finding
16 that 'the costs of leaving mental disorders untreated or undertreated are significant,' and
17 that 'it is not cost-effective to treat persons with mental disorders differently than persons
18 with medical and surgical disorders.'" *Id.* (quoting S.H.B. 1154, 59th Leg., 2005 Reg.
19 Sess. (Wash. 2005)); Dkt. # 9-4 at 3-4. "The Parity Act's objective was to achieve
20 coverage for mental health services 'under the same terms and conditions as medical and
21 surgical services.'" *Id.* The Parity Act defines "mental health services" as "medically
22 necessary outpatient and inpatient services provided to treat mental disorders covered by
23 the diagnostic categories listed in the most current version of the diagnostic and statistical
24 manual of mental disorders." RCW 48.44.341(1). The Act sets forth a five-year, three-
phase implementation process. *See* RCW 48.44.341(2)(a)-(c).

25 The first phase of the Act, applicable to health benefit plans "delivered, issued for
26 delivery, or renewed on or after January 1, 2006," required that "[a]ll health service
27 contracts providing health benefit plans that provide coverage for medical and surgical

1 services shall provide . . . [m]ental health services.” RCW 48.44.341(2)(a)(i).
2 Additionally, the copayment for such services could be no greater than the copayment for
3 medical or surgical services, and the plans were required to cover prescription drugs to
4 treat mental health disorders to the same extent and under the same terms and conditions
5 as other covered prescription drugs. RCW 48.44.341(2)(a)(i)–(ii).

6 Phase two, applicable to health plans delivered, issued, or renewed on or after
7 January 1, 2008, incorporated the mandates of phase one and added the requirement that
8 any health benefit plan that imposed a maximum out-of-pocket limit or stop loss must
9 impose a single limit or stop loss for medical, surgical, and mental health services. RCW
10 48.44.341(2)(b)(i).

11 The final phase, applicable to plans delivered, issued, or renewed on or after July
12 1, 2010, incorporates the mandates of the previous two phases and adds the condition that
13 any deductible requirement include mental health, medical, and surgical services.
14 Additionally, this phase adds the provision that “[t]reatment limitations or any other
15 financial requirements on coverage for mental health services are only allowed if the
16 same limitations or requirements are imposed on coverage for medical and surgical
17 services.” RCW 48.44.341(2)(c)(i).

18 **B. Article III Standing⁷**

19 Just like any other plaintiff, a plaintiff bringing an ERISA claim must have
20 standing pursuant to Article III of the United States Constitution. *Paulsen et al. v. CNF,*
21 *Inc., et al.*, 559 F.3d 1061, 1072 (9th Cir. 2009). To have standing under Article III, a
22 plaintiff must demonstrate that (1) he has suffered an actual or threatened injury in fact;
23 (2) the injury is causally connected to the conduct complained of; and (3) it is likely, and
24 not merely speculative, that his injury will be redressed by a favorable decision. *Lujan v.*

25 _____
26 ⁷ In opposition to both motions, defendants argue that both B.S. and DRW lack Article III
27 standing. Accordingly, the court addresses whether B.S. and DRW have constitutional standing
first. The court has addressed whether DRW has statutory standing under ERISA below.

1 | *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The requisite injury-in-fact pursuant to
2 Article III must be actual or threatened, and not merely speculative. *See id.*

3 1. B.S.

4 First, B.S. suffered the requisite injury in fact. On September 24, 2012, Regence
5 denied coverage of the occupational and speech therapy to treat his autism pursuant to the
6 neurodevelopmental therapy age exclusion. Dkt. # 6-6 at 3 (Ex. F to E.S. Decl.). The
7 medical professional evaluations before Regence indicated that the recommended
8 neurodevelopmental therapies were to treat his autism. *See* Dkt. # 6-2 at 5-7 (Ex. B to
9 E.S. Decl., April 17, 2012, Araujo Eval.) (confirming diagnosis of autistic spectrum and
10 identifying speech and language therapy for treatment); # 6-4 at 2-4 (Ex. D to E.S. Decl.,
11 July 25, 2012, Long Eval.) (identifying autism spectrum as diagnosis and speech and
12 language therapy for treatment); # 6-5 at 2 (Ex. E to E.S. Decl., Aug. 7, 2012, Wagner
13 Letter) (identifying autism spectrum disorder and noting that B.S. is planned for speech
14 therapy); *see also* Dkt. # 6-3 at 2-3 (Ex. C to E.S. Decl., Oct. 22, 2012, Gray Eval.)
15 (noting reason for referral as autism spectrum diagnosis, and referring reader to prior
16 evaluations recommending speech and occupational therapy).⁸ Accordingly, the court
17 finds that B.S. suffered an actual and particularized injury when Regence denied
18 coverage due to its neurodevelopmental therapy age exclusion. Additionally, given
19 Regence's continued and sustained position across several cases in denying
20 neurodevelopmental therapy to children age seven and older based on the age exclusion,
21 the court finds that it is likely that the injury will be ongoing without court intervention.

22 Second, B.S.'s denial of coverage for neurodevelopmental therapy to treat autism
23 is causally connected to Regence's standard practice to exclude such coverage based on
24 an insured's age. *See* Dkt. # 6-6 at 2-3 (Ex. F to E.S. Decl., Sept. 24, 2012, denial letter)

25

26 ⁸ The court notes that Dr. Gray's evaluation came after Regence's denial. The court also
27 notes that nothing in Dr. Gray's evaluation indicates that she believed the prior recommendations
for speech therapy were inappropriate or should not continue. Rather, she referred the reader to
the prior three assessments for a comprehensive review of their findings.

1 (identifying code 299.00⁹ (infantile autism), and identifying age exclusion as reason for
2 denial).

3 Finally, B.S.'s injury will be redressed by injunctive relief because Regence would
4 be prohibited from applying its age exclusion to B.S.'s neurodevelopmental therapies.
5 Defendants have argued that the neurodevelopmental therapies are not "medically
6 necessary."¹⁰ Dkt. # 26 at 19-20.¹¹ The court believes that the same evidence cited above
7 supports a finding that the neurodevelopmental therapies are likely medically necessary
8 for B.S.

9 Accordingly, the court finds that B.S. has standing to pursue injunctive relief.

10 2. DRW

11 Plaintiff argues that DRW has constitutional standing under the doctrine of
12 associational standing. Dkt. # 29 at 4-9.

13 "The doctrine of associational standing permits an organization to sue to redress
14 its members' injuries, even without a showing of injury to the association itself." *Or.*
15 *Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003) (internal quotations omitted).
16 An association has standing to bring suit on behalf of its members when "(a) its members
17 would otherwise have standing to sue in their own right; (b) the interests it seeks to

19 ⁹ The DSM-IV code for autistic disorder is 299.00.

20 ¹⁰ Defendants submitted supplemental authority from the Northern District of California
21 that found that class action was inappropriate where the court would have to make individual
22 determinations as to medical necessity. Dkt. # 49 at 4-6 (*Dennis F. v. Aetna Life Ins.*, Case No.
23 C12-2819SC, 2013 U.S. Dist. LEXIS 137849 (N.D. Cal. Sept. 25, 2013)). That case did not
24 address Article III standing. Additionally, defendants did not deny B.S.'s claim based on
25 medical necessity here. Rather, defendants denied B.S.'s claim based solely on the age exclusion
26 in the contract. Accordingly, that case is distinguishable from this action.

27 ¹¹ Defendants have not cited to any evidence in this portion of their argument.
28 Nevertheless, in December 2012, Dr. Lori Montaperto, the school psychologist, evaluated B.S.
29 for special education services. Dkt. # 27-2 at 2 (Ex. 6 to Little Decl.). Such evaluations are for
30 the purpose of determining the educational needs of students in the school district. See WAC
31 ADC 392-172A-03020. This evaluation for educational needs in school does not negate the
32 prior conclusions of various medical professionals that language and speech therapy was
33 indicated to treat B.S.'s autism.

1 protect are germane to the organization's purpose; and (c) neither the claim asserted nor
2 the relief requested requires the participation of individual members in the lawsuit. *Hunt*
3 *v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 343 (1977). The first two
4 requirements are constitutional in nature, the third is prudential. *Or. Advocacy*, 322 F.3d
5 at 1109. To satisfy the first prong of *Hunt*, at least one constituent of the organization
6 must have standing to sue in his/her own right. *Id.* at 1112.

7 In enacting the Protection and Advocacy for Mentally Ill Individuals Act of 1986
8 ("PAMII"), Congress recognized that individuals with mental illness are vulnerable to
9 abuse and serious injury, that family members of individuals with mental illness often
10 play a crucial role in advocating for rights of individuals with mental illness, that
11 individuals with mental illness are subject to neglect, including lack of treatment and
12 health care, among others, and that State systems for monitoring compliance with respect
13 to the rights of individuals with mental illness vary widely and are frequently inadequate.
14 42 U.S.C. § 10801(a). PAMII was enacted to ensure that the rights of individuals with
15 mental illness are protected and to assist States to establish and operate a protection and
16 advocacy system for individuals with mental illness that will "protect and advocate the
17 rights of such individuals through activities to ensure the enforcement of the Constitution
18 and Federal and State statutes" and to investigate incidents of abuse and neglect of such
19 individuals. *Id.* § 10801(b). "Under PAMII, protection and advocacy systems such as
20 [DRW] are authorized to 'pursue . . . legal, and other appropriate remedies to ensure the
21 protection of individuals with mental illness who are receiving care or treatment in the
22 State.'" *Or. Advocacy*, 322 F.3d at 1110 (quoting 42 U.S.C. § 10805(a)(1)(B)).

23 DRW protects and advocates for the legal and civil rights of those who have
24 physical, mental and developmental disabilities. Dkt. # 19 (Stroh Decl.) ¶ 3. A majority
25 of DRW's Board of Directors are self-identified as individuals with disabilities including
26 mental health conditions. *Id.* ¶ 5. DRW also has an advisory council composed
27 predominantly of individuals who self-identify as having mental health conditions. *Id.*

1 Additionally, “individuals who self-identify as having developmental mental conditions
2 and their family members participate in and guide DRW’s organizational mission and
3 advocacy efforts through DRW’s Disability Advisory Council, by participating on
4 DRW’s Board of Directors, and DRW’s public comment process.” *Id.* DRW has worked
5 to ensure that individuals with mental health conditions receive access to mental health
6 coverage, both in private insurance and public benefits. *Id.* ¶ 6. “For this reason, DRW
7 supported the Mental Health Parity Act and was a participant in the Mental Health Parity
8 Coalition.” *Id.* “All of the unnamed class members are DRW’s constituents. By
9 definition, all are diagnosed with mental health conditions and need access to non-
10 discriminatory health coverage. All fall within DRW’s mandate to ensure that the rights
11 of persons with mental health conditions are protected.”¹² *Id.* ¶8.

12 Accordingly, the court finds that B.S. is a constituent of DRW, and that DRW’s
13 constituents, including individuals with mental health conditions, possess enough indicia
14 of membership to satisfy the purposes of associational standing. *See Or. Advocacy*, 322
15 F.3d at 1111 (constituents possessed enough indicia of membership to satisfy purposes of
16 associational standing: “that the organization is sufficiently identified with and subject to
17 the influence of those it seeks to represent as to have a ‘personal stake in the outcome of
18 the controversy.’”).

19 Defendants incorrectly argue that a protection and advocacy organization has
20 limited authority to pursue legal remedies for an individual who is an individual with a
21 mental illness, but only with respect to matters which occur within 90 days after the date
22 of the discharge from a facility. Dkt. # 26 at 21 (citing 42 U.S.C. § 10805(a)(1)(C)).
23 Subsection (C) only applies to an individual who “was” an individual with mental illness,
24 whereas subsection (B) applies to individuals “with mental illness who are receiving care

25 ¹² The court notes that defendants did not object to, or move to strike, any portion of Mr.
26 Stroh’s declaration submitted with plaintiffs’ opening brief. While defendants note that Mr.
27 Stroh’s second declaration submitted in reply may conflict with this declaration and object to the
second declaration, the court has not considered the second declaration. Dkt. # 32 at 2 (Surreply).

1 or treatment in the State.” Since B.S. is an individual who currently has autism, he falls
2 within subsection (B). Defendants do not otherwise challenge the first *Hunt* factor on
3 any other grounds with respect to PAMII.¹³ Dkt. # 26 at 21. Accordingly, the court finds
4 that the first *Hunt* factor is met. *See Or. Advocacy*, 322 F.3d at 1110 (“Given OAC’s
5 statutory mission and focus under PAMII, its constituents—in this case, the mentally
6 incapacitated defendants—are the functional equivalent of members for purposes of
7 associational standing.”); 42 U.S.C. §§ 10805(a)(1)(B), 10802(4)(A) & (B)(ii); Dkt. # 19
8 (Stroh Decl.) ¶¶ 3-5, 8-9.

9 Defendants also argue that ERISA benefits litigation is not “germane” to the
10 protection and advocacy purpose under PAMII of abuse, injury and neglect under the
11 second prong of *Hunt*. Dkt. # 26 at 21. Defendants inaccurately frame the scope of
12 PAMII and the scope of this litigation. As indicated above, PAMII was enacted to ensure
13 that the rights of individuals with mental illness are protected and to assist States to
14 establish and operate a protection and advocacy system for individuals with mental
15 illness that will “protect and advocate the rights of such individuals through activities to
16 ensure the enforcement of the Constitution and Federal and State statutes” and to
17 investigate incidents of abuse and neglect of such individuals. 42 U.S.C. § 10801(b). In
18 this litigation, DRW seeks to pursue legal remedies of individuals with mental health
19 conditions by enforcing parity rights of Regence’s insureds. DRW’s purpose is to protect
20 and advocate for the legal and civil rights of those citizens of this State who have mental
21 and developmental disabilities. Dkt. # 19 (Stroh Decl.) ¶ 3; *see also id.* ¶ 6.
22 Accordingly, the court finds that the second *Hunt* prong is met with respect to PAMII.
23
24

25 _____
26 ¹³ The court notes that PAMII expressly defines the term “individual with mental illness”
27 to include a person who has a significant mental illness or emotional impairment and who “lives
in a community setting, including their home.” 42 U.S.C. § 10802(4)(B)(ii). Accordingly, the
express language of the statute demonstrates that the individual need not be receiving treatment
in a facility, as defendant argues.

1 Since the court has found that DRW has met the first two prongs in *Hunt* with
2 respect to PAMII, and defendants do not challenge the third, the court finds that DRW
3 has constitutional standing to represent its constituents—individuals with physical,
4 mental and developmental disabilities in Washington State.¹⁴

5 **C. Preliminary Injunction**

6 “A plaintiff seeking a preliminary injunction must establish that he is likely to
7 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
8 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
9 the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct.
10 365, 374 (2008). An injunction will not issue if the moving party merely shows a
11 possibility of some remote future injury or a conjectural or hypothetical injury. *Park*
12 *Village Apartment Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th
13 Cir. 2011). Additionally, mandatory injunctions are particularly disfavored, and are not
14 granted unless extreme or very serious damage will result, and are not issued in doubtful
15 cases. *Id.*

16 1. Likelihood of Success on the Merits

17 Plaintiffs argue that they are likely to succeed on the merits because (1) the Parity
18 Act establishes a baseline coverage mandate, such that Regence cannot exclude medically
19 necessary outpatient services to treat mental health conditions listed in the DSM; (2)
20 Regence’s plan must incorporate the express requirement of the Parity Act, and so its
21 blanket exclusion of neurodevelopmental therapy coverage for persons age seven and
22 older violates state law; and (3) Regence is collaterally estopped from relitigating this
23 same issue. Dkt. # 17 at 17.

24 _____
25 ¹⁴ Given that the court has found that DRW has associational standing, the court need not
separately address defendants’ argument that DRW fails to establish standing based on injury to
itself. Dkt. # 26 at 23; *see Or. Advocacy*, 322 F.3d at 1109 (associational standing allows
organization to sue to redress its members’ injuries without a showing of injury to the association
itself).

1 Defendants argue that plaintiffs are not likely to succeed on the merits because (1)
2 Regence's neurodevelopmental therapy benefit in B.S.'s plan complies with the Parity
3 Act because it applies the "age limit" equally for DSM and non-DSM conditions; (2) the
4 recent Washington State Office of Insurance Commissioner's ("WOIC") regulations do
5 not apply to B.S.'s plans; and (3) offensive non-mutual collateral estoppel is not
6 applicable.¹⁵ Dkt. # 26 at 6-14.

7 a. Age-Based Restriction

8 Defendants repeatedly refer to the age-based restriction in the plan as an "age
9 limit." Dkt. # 26 at 8, 10, 11. However, in *J.T.*, this court squarely addressed whether
10 the age-based restriction on coverage should be construed as a treatment limitation or an
11 exclusion. *J.T. v. Regence BlueShield*, 291 F.R.D. 601, 608 (W.D. Wash. 2013). The
12 court interpreted the relevant provision of the statute: "[t]reatment limitations or any
13 other financial requirements on coverage for mental health services are only allowed if
14 the same limitations or requirements are imposed on coverage for medical and surgical
15 services[.]" *Id.*; RCW 48.44.341(2)(c)(i). The court found that reading "RCW 48.44.341
16 as a whole indicates that although the coverage mandate originated in phase one, it was
17 permissible to impose certain financial limits or requirements on that coverage until full
18 parity was achieved in phase three. What was not permissible in phase one was to
19 completely exclude coverage for an entire class of beneficiaries." *Id.*

20 That reasoning applies equally here to B.S. As in *J.T.*, defendants seek to exclude
21 coverage for children age seven and older seeking neurodevelopmental therapy, rather
22 than seek a treatment limitation or other financial requirement on coverage, such as visit
23 limits or annual monetary caps. The cases cited by defendants rely on the "treatment
24 limitations" clause in finding that visit limitations and annual monetary caps do not

25
26

¹⁵ The court has also addressed defendants' argument regarding whether DRW lacks
27 statutory standing under ERISA under this prong because if DRW lacks statutory standing, it is
not likely to succeed.

1 violate the Parity Act. *See Z.D. v. Group Health Coop.*, Case No. C11-1119RSL, 2013
2 WL 1412388, *1-3; *O.S.T. v. Regence BlueShield*, Case No.11-2-34187-9 SEA, Dkt. #
3 27-3 at 3-6 (Ex. 8 to Little Decl., April 17, 2012 order); *J.T.*, 291 F.R.D. at 614. Indeed,
4 the court is not aware of any case that has held that the age-based restriction is a
5 treatment limitation. Although defendant contended during oral argument that it was not
6 arguing that the age restriction was a treatment limitation, all of the cases it relied on
7 analyzed the “treatment limitations” clause.

8 The court finds that plaintiffs are likely to succeed on the merits that that the age-
9 based restriction is an exclusion of coverage, not a treatment limitation, and therefore
10 likely invalid.¹⁶ *See* Dkt. # 9-1 at 5, 6, 8, 11, 14 (Ex. A to 1st Hamburger Decl., Rainey
11 Depo. at 14:18-22, 18:6-11, 27:11-20, 37:21-38:1, 49:18-50:10) (testifying that group
12 plans exclude coverage for neurodevelopmental therapies after an insured reaches the age
13 of seven).

14 b. *ERISA Standing*

15 Defendants also argue that DRW does not have statutory standing under ERISA.¹⁷
16 Dkt. # 26 at 23-24.

17 An ERISA civil action may be brought by a participant, beneficiary, fiduciary, or
18 the Secretary of Labor. 29 U.S.C. § 1132(a).

19 Defendants appear to conflate constitutional standing and statutory standing under
20 ERISA in arguing that no court has held that a protection and advocacy system may

21 ¹⁶ Accordingly, the court need not address defendants’ second and third arguments that
22 WOIC’s regulations do not apply to B.S.’s plan or that collateral estoppel is inapplicable. The
23 court notes that it appears that collateral estoppel would be appropriate if plaintiffs provided the
24 court with the plan language, 30(b)(6) testimony, briefing and other relevant documents in the
25 *O.S.T.* case to support its argument that Regence already litigated the issue of its standard
26 practice to exclude neurodevelopmental therapy for children ages seven and older. During oral
27 argument, plaintiff referenced the arguments and issues presented to Judge Erlick, but that record
is not before the court. Defendants’ argument that *O.S.T.* only applied to non-ERISA group
plans appears to be a distinction without a difference where defendants interpreted similar policy
language the same way and it appears that the same issues were litigated by the same parties.

¹⁷ The court notes that defendants do not challenge B.S.’s standing under ERISA.

1 purport to act as a participant, beneficiary or fiduciary in pursuing ERISA benefits claims
2 on behalf of its constituents. Dkt. # 26 at 23. Plaintiffs do not contend that ERISA
3 claims have been assigned. Rather, they argue that DRW is both the “plan sponsor” and
4 “plan administrator” under its plan with Regence, and therefore a fiduciary. Dkt. # 29 at
5 8-9.

6 “ERISA defines a fiduciary as any person ‘to the extent … he has any
7 discretionary authority or discretionary responsibility in the administration of [an
8 employee benefit] plan.’” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004)
9 (quoting § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii)). “[A] plan administrator engages
10 in a fiduciary act when making a discretionary determination about whether a claimant is
11 entitled to benefits under the terms of the plan documents.” *Varsity Corp. v. Howe*, 516
12 U.S. 489, 511 (1996); *see also* 29 C.F.R. § 2509.75-8, D-3 (“[A] plan administrator or a
13 trustee of a plan must, [by] the very nature of his position, have ‘discretionary authority
14 or discretionary responsibility in the administration’ of the plan within the meaning of
15 section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be
16 fiduciaries.”).

17 The documents plaintiffs identify to support their argument that DRW has ERISA
18 standing are the amended complaint and Stroh declaration. Dkt. # 29 at 8 (citing Dkt. #
19 13 (FAC) ¶ 6 & Dkt. # 19 ¶ 7). In the amended complaint, plaintiffs allege that “DRW is
20 also an ERISA plan sponsor and an ERISA plan administrator under a plan insured by
21 Regence.” Dkt. # 13 (FAC) ¶ 6. In his declaration, Mr. Stroh represents that DRW
22 purchases health insurance for its employees through Regence and that under the
23 Regence contract, DRW is both the “plan sponsor” and “plan administrator.” Dkt. # 19
24 (Stroh Decl.) ¶ 7. However, “an employer’s fiduciary duties under ERISA are implicated
25 only when it acts in the latter capacity.” *Beck v. PACE Intern. Union*, 551 U.S. 96, 103
26 (2007).

27

During oral argument, defendant conceded that DRW was a plan administrator and that there was no need to parse out whether it was acting in its role as a plan sponsor or plan administrator.¹⁸ As a plan administrator, DRW is a fiduciary of the Regence plan, and therefore has standing under ERISA. 29 C.F.R. § 2509.75-8, D-3.

2. Irreparable Harm

Defendants argue that B.S. will not suffer immediate irreparable harm because speech or occupational therapy is not currently medically necessary for B.S. Dkt. # 26 at 15. However, the court has already found that the evidence before the court supports a finding that the neurodevelopmental therapies are likely medically necessary.

10 Additionally, the Ninth Circuit has recognized that reduction or elimination of
11 health benefits irreparably harms the participants in the programs being cut. *See e.g.*,
12 *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2012) (loss of medically necessary services
13 under Washington law related to mental and physical health demonstrates likelihood of
14 irreparable injury); *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (irreparable harm
15 includes delayed and/or complete lack of necessary treatment, and increased pain and
16 medical complications); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (denial of
17 needed medical care creates risk of irreparable injury).

18 Defendants do not contest this legal authority. Rather, they argue that the harm is
19 not imminent or immediate. Dkt. # 26 at 17. Defendants argue that plaintiffs waited
20 more than eight months, from the September 27, 2012, denial of appeal, until June 6,
21 2013, before pursuing any relief on B.S.’s behalf. *Id.* The court disagrees. B.S.
22 contacted plaintiffs’ counsel in January 2013. In the *J.T.* case, plaintiffs first raised B.S.
23 as a putative class member on January 10, 2013, suggesting that the court could substitute

¹⁸ Although defendant reiterated during oral argument that there is no case that allows a protection and advocacy system to act as a fiduciary in pursuing ERISA benefits claims on behalf of its constituents, there is also no case that prohibits it. Whether an entity has associational standing for purposes of Article III is a separate and distinct analysis from whether an entity has standing under ERISA.

1 him for S.A. if the court had concerns about whether S.A. was an adequate
2 representative. Case No. C12-90RAJ, Dkt. # 28 at 10 n.3. The court did not rule on the
3 pending motions until June 4, 2013, in which the court denied plaintiffs' suggestion to
4 substitute B.S. Case No. C12-90RAJ, Dkt. # 67. Two days later, plaintiffs file a motion
5 to amend the complaint to add B.S. as a plaintiff, which the court denied on July 1, 2013.
6 Dkt. ## 68, 85. Plaintiffs filed this case on July 11, 2013, and filed the motion for
7 preliminary injunction on the same day. Dkt. ## 1, 4. Accordingly, the court finds that
8 plaintiffs did not unduly delay seeking a preliminary injunction.

9 In the last two decades, research and program development in the area of
10 educational intervention have focused largely on very young children with Autistic
11 Spectrum Disorder "because of earlier identification and evidence that early intensive
12 intervention may result in substantially better outcomes." Dkt. # 9-5 at 6 (Ex. L to
13 Hamburger Decl., Scott Myers, MD, Chris Johnson, MD, MEd, & Council on Children
14 with Disabilities, *Mgmt. of Children with Autism Spectrum Disorders*, Am. Academy of
15 Pediatrics, Clinical Report). Additionally, children who need neurodevelopmental
16 therapies, but do not receive them in a timely manner and at the required intensity "are
17 likely to lose the opportunity to have the impact of their developmental deficits reduced
18 to the maximum degree, or to enjoy the prospects of their development being restored to
19 normal functioning, or at the very least, as near to normal functioning as possible." Dkt.
20 # 7 (Glass Decl.) ¶ 8. "Especially for the very young child, losing access to needed
21 therapies in a timely manner can make reversible or treatable developmental conditions
22 more severe, of greater long-term functional impact and, at times, devastating and
23 unneeded consequences may be seen." *Id.* Accordingly, it appears from the evidence
24 before the court that B.S., at age 9, has a greater urgency for the recommended treatment
25 given that the efficacy of treatment reduces with age.

26 For the reasons stated above, the court finds that B.S. has demonstrated the
27 likelihood that defendants wrongfully denied him medical coverage for medically

1 necessary neurodevelopmental therapies to treat his autism, and that such denial will
2 likely cause immediate, irreparable harm to B.S. *See M.R.*, 697 F.3d at 733; *Rodde*, 357
3 F.3d at 999; *Beltran*, 677 F.2d at 1322; *see also* Dkt. # 9-4 at 3 (Ex. I to Hamburger
4 Decl., Substitute House Bill 1154) (“The legislature finds that the costs of leaving mental
5 disorders untreated or undertreated are significant, and often include: Decreased job
6 productivity, loss of employment, increased disability costs, deteriorating school
7 performance, increased use of other health services, treatment delays leading to more
8 costly treatments, suicide, family breakdown, and impoverishment, and
9 institutionalization, whether in hospitals, juvenile detention, jails, or prisons.”).

10 3. Balance of Equities and Public Interest

11 With respect to balancing the equities, defendants argue that plaintiffs rely on
12 speculative harm for unnamed persons, that the available research shows that the
13 effectiveness of these therapies for developmental delays diminishes with age and is most
14 cost effective in the very young, and that less than 7% of individuals age 7 and over with
15 neurodevelopmental disorders related to a DSM condition had any functional limitation
16 at school, work or home. Dkt. # 26 at 18.

17 As discussed above, B.S. has demonstrated the likelihood that defendants
18 wrongfully denied coverage of medically necessary neurodevelopmental therapies to treat
19 his autism in violation of the Parity Act. B.S. has also demonstrated the likelihood of
20 irreparable harm. Such therapies are most effective in young children, and losing access
21 to needed therapies in a timely manner can make reversible or treatable developmental
22 conditions more severe, of greater long-term functional impact and, at times, devastating
23 and unneeded consequences may be seen. While the effectiveness of these therapies
24 appears to diminish with age, there is no evidence before the court that B.S. or other
25 putative class members will not benefit from such therapies. Rather, the evidence before
26 the court indicates that B.S. will benefit from such therapy. Additionally, even if the
27 statistic provided by defendants is accurate and relevant to this analysis, there would still

1 be seven percent of individuals over the age of 7 who would benefit from such
2 therapies.¹⁹ When faced with a conflict between financial concerns and an individual's
3 health, the balance of the hardships tips in plaintiffs' favor. *See Rodde*, 357 F.3d at 999
4 (concluding that when faced with a conflict between financial concerns and preventable
5 human suffering, court had little difficulty concluding that the balance of the hardships
6 tips decidedly in plaintiffs' favor). Accordingly, the court finds that the balance of the
7 hardships favors plaintiffs, particularly where it appears that the benefit of therapies
8 reduces as the child gets older.

9 The court also finds that the public interest will be served by ensuring that
10 defendants comply with the Parity Act and provide neurodevelopmental therapy benefits
11 to children older than six to treat mental health conditions.

12 Accordingly, the court finds that a preliminary injunction should issue.

13 **E. Class Certification²⁰**

14 Plaintiffs seek to certify the prospective neurodevelopmental subclass defined as
15 follows:

16 All individuals who:

17 (1) are, or will be, beneficiaries under an ERISA-governed health plan that
18 has been or will delivered, issued for delivery, or renewed on or after
19 January 1, 2006, by Regence; and (2) require neurodevelopmental therapy
20 for the treatment of a qualified mental health condition.

21
22 ¹⁹ The children over the age of 7 would seem to have a greater urgency for therapy where
23 the efficacy and benefits of therapy decline as the child gets older.

24 ²⁰ Although the Ninth Circuit has noted that the "better procedure" may be to defer ruling
25 on a class certification motion where a State Supreme Court is considering the same legal issue
26 (*Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 n.6 (9th Cir. 2003)), given the
27 nature of the hardship, the urgency with which children in the putative class need coverage, and
 defendants' policy and firm commitment to continue denying coverage for medically necessary
 neurodevelopmental therapies for children with mental health conditions over the age of six
 based on the age exclusion, the court does not believe it would be prudent to await such a
 decision.

1 **Definitions:**

2 (1) The term “Regence” shall mean (a) Regence BlueShield; (b) any
3 affiliate of defendants; (c) predecessors or successors in interest of any of
4 the foregoing; and (d) all subsidiaries or parent entities of any of the
foregoing acting as a health carrier in the State of Washington; and

5 (2) The term “qualified mental health condition” shall mean a condition
6 listed in the most recent edition of the Diagnostic and Statistical Manual
7 (DSM) published by the American Psychiatric Association other than (a)
substance related disorders and (b) life transition problems, currently
8 referred to as “V” codes, and diagnostic codes 302 through 302.9 as found
in the DSM, where the service received, required, or expected to be
9 required is not properly classified as skilled nursing facility services, home
health care, residential treatment, custodial care or non-medically necessary
10 court-ordered treatment.

11 Dkt. # 20 at 8.

12 “The class action is ‘an exception to the usual rule that litigation is conducted by
13 and on behalf of the individual named parties only.’” *Comcast Corp. v. Behrend*, 133 S.
14 Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).
15 Thus, the court must perform a rigorous analysis that the prerequisites of Rule 23(a) have
16 been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As part of
17 this analysis, the court “must consider the merits [of the substantive claims] if they
18 overlap with the Rule 23(a) requirements.”²¹ *Ellis v. Costco Wholesale Corp.*, 657 F.3d
19 970, 981 (9th Cir. 2011) (emphasis in original); *see also Comcast*, 133 S. Ct. at 1432.

20 A plaintiff seeking class certification has the burden of demonstrating that each of
21 the elements of Rule 23(a) are present: “(1) the class is so numerous that joinder of all
22 members is impracticable; (2) there are questions of law or fact common to the class; (3)
23 the claims or defenses of the representative parties are typical of the claims or defenses of
24 the class; and (4) the representative parties will fairly and adequately protect the interests
25 of the class.” Fed. R. Civ. P. 23(a); *Ellis*, 657 F.3d at 979–80. Once the plaintiff has

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27 ²¹ The court incorporates by reference its analysis above regarding the merits of
plaintiffs’ claims.

1 demonstrated that each of these elements is present, he must then prove that at least one
2 of the three prongs of Rule 23(b) is satisfied. Fed. R. Civ. P. 23(b); *Ellis*, 657 F.3d at
3 979–80.

4 1. Numerosity

5 Numerosity is satisfied where joinder would be impracticable. *Smith v. Univ. of*
6 *Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998) (citing *Harris v. Palm*
7 *Spring Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964)).

8 Defendants do not challenge numerosity. Plaintiffs' proposed subclass is
9 projected to number in the tens of thousands. Dkt. # 9-6 at 41-42 (Ex. S to Hamburger
10 Decl., Fox Decl. ¶ 9). Accordingly, numerosity is met.

11 2. Commonality

12 To meet the commonality requirement, a plaintiff must demonstrate that "there are
13 questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme
14 Court has explained that this requirement is better understood as an inquiry into the
15 capacity of a classwide proceeding to generate common *answers* apt to drive the
16 resolution of the litigation. *Wal-Mart*, 131 S. Ct. at 2551. Commonality only requires a
17 single significant question of law or fact. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d
18 581, 589 (9th Cir. 2012).

19 Plaintiffs identify the following, significant common question: Does Regence's
20 exclusion of neurodevelopmental therapies for the treatment of DSM mental conditions
21 for its insureds over the age of six violate the Washington Mental Health Parity Act?
22 Dkt. ## 20 at 11; 28 at 7. The court agrees that resolution of this significant common
23 question will resolve several issues that are central to the validity of each claim in one
24 stroke: (1) whether Regence wrongfully denied benefits and misinformed its insureds
25 under the ERISA plans it insures, (2) whether Regence breached its fiduciary duties
26 under ERISA, and (3) whether declaratory and injunctive relief is appropriate.

27

1 Defendants' arguments against commonality regarding the individualized issues
2 raised go to preponderance under Rule 23(b)(3), not whether there are common issues
3 under Rule 23(a)(2). *See Mazza*, 666 F.3d at 589 ("Even assuming arguendo that we
4 were to agree with Honda's 'crucial question' contention, the individualized issues raised
5 go to preponderance under Rule 23(b)(3), not to whether there are common issues under
6 Rule 23(a)(2).").²²

7 3. Typicality

8 The typicality requirement of Rule 23(a) ensures that the interests of the named
9 plaintiff align with those of the class. Fed. R. Civ. P. 23(a)(3); *Hanon v. Dataproducts*
10 *Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). To determine whether the named plaintiff's
11 claims are typical, the court analyzes "whether other members have the same or similar
12 injury, whether the action is based on conduct which is not unique to the named
13 plaintiffs, and whether other class members have been injured by the same course of
14 conduct." *Hanon*, 976 F.2d at 508. If a class representative's claims are subject to
15 unique defenses that threaten to attract the focus of the litigation, class certification is
16 inappropriate. *Id.*

17 Defendants argue that B.S.'s claims are not typical because (1)
18 neurodevelopmental therapy is not medically necessary or currently indicated for him, (2)
19 the therapy was not provided to treat a DSM condition, and (3) he did not exhaust his
20 administrative remedies. Dkt. # 23 at 14. The court has already considered and rejected
21 the first two arguments above.²³

22 ²² Defendants cite *Mazza* for the proposition that no class may be certified that contains
23 members lacking Article III standing. Dkt. # 23 at 7. *Mazza* announced this rule under its
24 analysis of predominance of common factual questions, not commonality. 666 F.3d at 594-95.

25 ²³ The court notes, again, that the court previously rejected the first two arguments.
26 Additionally, defendants have consistently denied coverage based solely on the age exclusion,
27 not medical necessity or any other reason that would require individualized determinations of the
class claims. Indeed, at the time that Regence made its coverage decision for B.S., the medical
evidence before it indicated that the therapies were medically necessary to treat his autism, and
Regence denied coverage for neurodevelopmental therapy based solely on the age exclusion.

1 “A beneficiary seeking a determination of rights or benefits under a plan must first
2 exhaust the administrative remedies provided by the plan.” *Horan v. Koch*, 947 F.2d
3 1412, 1416 (9th Cir. 1991) (overruled on other grounds). “A district court has discretion
4 to waive the exhaustion requirement . . . and should do so when exhaustion would be
5 futile.” *Id.*

6 Defendants have consistently and routinely interpreted their policies to deny
7 coverage for neurodevelopmental therapy for children with mental health conditions age
8 seven and older based on the age exclusion. Under these circumstances, exhaustion
9 would be futile. The court therefore exercises its discretion and waives exhaustion for
10 B.S. and putative class members.

11 Accordingly, the court finds that B.S. is not subject to unique defenses identified
12 by defendant, and finds that his claims are typical of the claims of the proposed class.

13 4. Adequacy of Representation

14 The adequacy requirement under Rule 23(a) has two components: (1) whether any
15 conflicts of interests exist between plaintiffs and their counsel and other class members,
16 and (2) whether plaintiffs and their counsel will vigorously prosecute the action on behalf
17 of the class members. Fed. R. Civ. P. 23(a)(4); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
18 1020 (9th Cir. 1998).

19 Defendants argue that B.S. is not an adequate representative because of the alleged
20 unique defenses. Dkt. # 23 at 15. The court has already rejected these arguments above.

21 Dkt. ## 6-2 at 5-7 (Ex. B to E.S. Decl., Araujo Eval.); 6-4 at 2-4 (Ex. D to E.S. Decl., Long
22 Eval.); 6-5 at 2 (Ex. E to E.S. Decl., Wagner Letter); 6-6 at 3 (Ex. F to E.S. Decl., Denial of
23 Coverage Letter); *see also* Dkt. # 6-1 at 18-19 (Ex. A to E.S. Decl., Policy at 11) (“Mental
24 Health Services means Medically Necessary outpatient services . . .”); WAC 284-30-380(1)
25 (requiring insurers to specify the grounds for denying a claim). The court expresses no opinion
26 at this time regarding whether Regence should be estopped from asserting defenses other than
27 the age exclusion since neither party has provided briefing on this issue. *See Hayden v. Mut. of*
Enumclaw Ins. Co., 141 Wash. 2d 55, 63, 1 P.3d 1167 (Wash. 2000) (under traditional forms of
estoppel available in insurance cases, insureds must demonstrate that they either suffered
prejudice or the insurer acted in bad faith when it failed to raise all its grounds for denial in its
initial denial letter).

1 Defendants have not identified any conflicts of interest between B.S. and counsel and
2 other class members, and the court finds none. Additionally, B.S.'s father is familiar
3 with the duties and responsibilities of being a class represented, and will diligently look
4 out for the interests of all class members. Dkt. # 6 (E.S. Decl.) ¶ 14.

5 The court finds that B.S. is an adequate representative for the subclass identified
6 above.

7 5. Rule 23(b)

8 Having concluded that all the Rule 23(a) factors are present, B.S. must now prove
9 that at least one of the three prongs of Rule 23(b) is satisfied. Fed. R. Civ. P. 23(b);
10 *Comcast*, 133 S. Ct. at 1432. Plaintiffs argue that certification is appropriate for the
11 neurodevelopmental therapy age exclusion subclass under Rule 23(b)(1) and (2) for the
12 following claims:

- 13 • Under ERISA § 502(a)(1)(B), to “enforce his rights under the terms
14 of the plan, [and] to clarify his rights to future benefits under the
terms of the plan.” 29 U.S.C. § 1132(a)(1)(B).
- 15 • Under ERISA § 502(a)(2), to seek “appropriate relief” under ERISA
16 § 409(a), which permits “equitable or remedial relief as the court
may deem appropriate” 29 U.S.C. § 1132(a)(2); 29 U.S.C. §
17 1109(a).
- 18 • Under ERISA § 502(a)(3), to seek non-monetary relief “to enjoin
19 any act or practice which violates any provision of this subchapter or
the terms of the plan, or (B) to obtain other appropriate equitable
relief (i) to redress such violations or (ii) to enforce any provisions
20 of this subchapter of the terms of the plan.” 29 U.S.C. § 1132(a)(3).

21 Dkt. # 20 at 15.

22 Under Rule 23(b)(1), class action is appropriate if prosecuting separate actions by
23 individual class members would create a risk of inconsistent results that would establish
24 incompatible standards of conduct for the party opposing the class, or adjudications with
25 respect to individual class members would be dispositive of, or substantially impair, the
26

1 interests of the other putative class members not parties to the adjudication. Fed. R. Civ.
2 Proc. 23(b)(1).

3 Defendants again argue that individualized issues unique to each plaintiff preclude
4 certification. Dkt. # 23 at 16. The court disagrees. The issue confronting every putative
5 class member is whether defendants may deny coverage for neurodevelopmental therapy
6 for mental health conditions based on the age exclusion. “As a fiduciary, [Regence] is
7 bound to follow the terms of the Plan.” *Z.D. v. Group Health Co-op.*, Case No C11-
8 1119RSL, 2012 WL 1977962, *7 (W.D. Wash. June 1, 2012) (citing 29 U.S.C. §
9 1104(a)(1)(D)). “Moreover, ERISA requires that, ‘where appropriate,’ plan provisions
10 must be ‘applied consistently with respect to similarly situated claimants.’” *Id.* (citing
11 C.F.R. § 2560.503-1(b)(5)). “Thus, were this Court to find that the Plan requires
12 Defendants to act in a certain fashion, ERISA would require [Regence] to act in a similar
13 fashion toward all beneficiaries—the quintessential (b)(1)(B) scenario.” *Id.* “[I]f another
14 court were to interpret the Plan differently, it would trap Defendants ‘in the inescapable
15 legal quagmire of not being able to comply with one such judgment without violating the
16 terms of another,’” which is what (b)(1)(A) was enacted to remedy. *Id.*

17 The court finds that the subclass is certifiable under Rule 23(b)(1).²⁴

18 VI. CONCLUSION

19 For all of the foregoing reasons, the court GRANTS plaintiffs’ motions for
20 preliminary injunction and class certification.

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22
23 ²⁴ Alternatively, the court also finds that the subclass is certifiable under Rule 23(b)(2)
24 where the court need only determine the requirements of Washington law as applied to the plan
25 as a whole. Rule 23(b)(2) allows certification if the party opposing the class has acted or refused
26 to act on grounds that apply generally to the class so that final injunctive relief or corresponding
27 declaratory relief is appropriate respecting the class as a whole. Here, the injunction will
prohibit defendants’ policy and practice of denying neurodevelopmental therapy coverage to
treat mental health conditions based on the age exclusion. Class certification under 23(b)(2) is
therefore appropriate.

VII. PRELIMINARY INJUNCTION

For the reasons stated above, the court enters the following preliminary injunction.

For the pendency of this litigation, defendants shall not deny coverage for B.S.'s, or any putative class member's, requests for neurodevelopmental therapy benefits to treat a mental health condition based on the age exclusion.

6 Additionally, defendants do not object to plaintiffs' argument that no bond should
7 be required (*see* Dkt. # 26), and the court uses its discretion to dispense with the security
8 requirement here. *See Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766
9 F.2d 1319, 1325 (9th Cir. 1985) ("The court has discretion to dispense with the security
10 requirement, or to request mere nominal security, where requiring security would
11 effectively deny access to judicial review.").

VIII. CLASS CERTIFICATION

13 The court certifies the following class for the purpose of seeking declaratory and
14 injunctive relief under ERISA §§ 502(a)(1)(B), (a)(2), and (a)(3):

All individuals who:

(1) are, or will be, beneficiaries under an ERISA-governed health plan that has been or will be delivered, issued for delivery, or renewed on or after January 1, 2006, by Regence; and (2) require neurodevelopmental therapy for the treatment of a qualified mental health condition.

Definitions:

(1) The term “Regence” shall mean (a) Regence BlueShield; (b) any affiliate of defendants; (c) predecessors or successors in interest of any of the foregoing; and (d) all subsidiaries or parent entities of any of the foregoing acting as a health carrier in the State of Washington; and

(2) The term “qualified mental health condition” shall mean a condition listed in the most recent edition of the Diagnostic and Statistical Manual (DSM) published by the American Psychiatric Association other than (a) substance related disorders and (b) life transition problems, currently referred to as “V” codes, and diagnostic codes 302 through 302.9 as found in the DSM, where the service received, required, or expected to be

1 required is not properly classified as skilled nursing facility services, home
2 health care, residential treatment, custodial care or non-medically necessary
court-ordered treatment.

3 The court appoints the law firm Sirianni Youtz Spoonemore, and attorneys
4 Richard Spoonemore and Eleanor Hamburger, as class counsel, and names B.S., by and
5 through his guardians, as class representative.

6 The parties shall meet and confer regarding the notice to be provided pursuant to
7 Rule 23(c)(2) within seven days of this order, and file a joint document proposing the
8 form of notice to be given to putative class members within ten days of this order along
9 with a proposed order approving the form of notice.

10 Dated this 24th day of January, 2014.

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13 The Honorable Richard A. Jones
14 United States District Judge
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